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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 160205084-6510-02]

RIN 0648-BF76

International Fisheries; Western and Central Pacific Fisheries for Highly Migratory Species; Purse Seine Observer Requirements, and Fishing Restrictions and Limits in Purse Seine and Longline Fisheries for 2016-2017

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: Under authority of the Western and Central Pacific Fisheries Convention Implementation Act (WCPFC Implementation Act), NMFS issues this final rule that, first, requires that U.S. purse seine vessels carry observers on fishing trips in the western and central Pacific Ocean (WCPO); second, establishes restrictions in 2016 and 2017 on the use of fish aggregating devices (FADs) by U.S. purse seine vessels in the WCPO; and third, establishes limits in 2016 and 2017 on the amount of bigeye tuna that may be captured by U.S. longline vessels in the WCPO. This action implementing specific provisions of Conservation and Management Measure (CMM) 2015-01 is necessary to satisfy the obligations of the United States as a Contracting Party to the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and

Central Pacific Ocean (Convention), pursuant to the authority of the WCPFC Implementation Act.

DATES: Effective [*Insert date 30 days after date of publication in the FEDERAL REGISTER*], except § 300.223(b)(1) introductory text and paragraphs (b)(2)(i) through (iv), and § 300.224(a), which shall be effective July 1, 2016.

ADDRESSES: Copies of supporting documents prepared for this final rule, including the regulatory impact review (RIR), and the programmatic environmental assessment (PEA) and supplemental information report (SIR) prepared for National Environmental Policy Act (NEPA) purposes, as well as the proposed rule, are available via the Federal e-rulemaking Portal, at *www.regulations.gov* (search for Docket ID NOAA-NMFS-2016-0031). Those documents are also available from NMFS at the following address: Michael Tosatto, Regional Administrator, NMFS, Pacific Islands Regional Office (PIRO), 1845 Wasp Blvd., Building 176, Honolulu, HI 96818.

A final regulatory flexibility analysis (FRFA) prepared under authority of the Regulatory Flexibility Act is included in the Classification section of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Tom Graham, NMFS PIRO, 808-725-5032.

SUPPLEMENTARY INFORMATION:

Background

On April 27, 2016, NMFS published a proposed rule in the **Federal Register** (81 FR 24772). The proposed rule was open for public comment until May 12, 2016.

This final rule is issued under the authority of the WCPFC Implementation Act

(16 U.S.C. 6901 *et seq.*), which authorizes the Secretary of Commerce, in consultation with the Secretary of State and the Secretary of the Department in which the United States Coast Guard is operating (currently the Department of Homeland Security), to promulgate such regulations as may be necessary to carry out the obligations of the United States under the Convention, including the decisions of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Commission or WCPFC). The authority to promulgate regulations has been delegated to NMFS.

This final rule implements specific provisions of the Commission's Conservation and Management Measure (CMM) 2015-01, "Conservation and Management Measure for Bigeye, Yellowfin, and Skipjack Tuna in the Western and Central Pacific Ocean." The preamble to the proposed rule provides background information on the Convention and the Commission, the provisions of CMM 2015-01 that are being implemented in this rule, and the basis for the proposed regulations, which is not repeated here.

The Action

This final rule includes three elements, described in detail below, that will be included in regulations at 50 CFR part 300, subpart O.

1. Purse seine observer requirements

This final rule prohibits U.S. purse seine vessels from fishing in the Convention Area between the latitudes of 20° N. and 20° S. without a WCPFC observer on board, with the exception of fishing trips during which any fishing in the Convention Area takes place entirely within areas under the jurisdiction of a single nation other than the United States. Although U.S. purse seine vessels are exempt from this requirement on trips in

which fishing occurs only in the waters of a single foreign nation, it is expected that such foreign nations will require that U.S. purse seine vessels carry observers if fishing in their waters.

A WCPFC observer is an observer deployed from an observer program that has been authorized by the Commission to be part of the WCPFC Regional Observer Programme (see definition at 50 CFR 300.211). Currently, the Pacific Islands Forum Fisheries Agency (FFA) observer program, from which observers for the U.S. WCPO purse seine fleet have traditionally been deployed, and the NMFS observer program, among others, are authorized as part of the WCPFC Regional Observer Programme. Thus, observers deployed by these programs are considered WCPFC observers.

2. Purse seine FAD restrictions for 2016-2017

This final rule establishes restrictions on the use of FADs by purse seine vessels, including periods in 2016 and 2017 during which specific uses of FADs are prohibited (FAD prohibition periods), annual limits in 2016 and 2017 on the number of purse seine sets that may be made on FADs (FAD sets), and restrictions on the use of FADs on the high seas throughout 2017.

Specifically, this final rule establishes FAD prohibition periods from July 1 through September 30 in each of 2016 and 2017, a limit of 2,522 FAD sets in each of 2016 and 2017, and a prohibition on FAD sets on the high seas during 2017.

As defined at 50 CFR 300.211, a FAD is “any artificial or natural floating object, whether anchored or not and whether situated at the water surface or not, that is capable of aggregating fish, as well as any object used for that purpose that is situated on board a vessel or otherwise out of the water. The definition of FAD does not include a vessel.”

Although the definition of a FAD does not include a vessel, the restrictions during the FAD prohibition periods include certain activities related to fish that have aggregated in association with a vessel, or drawn by a vessel, as described below.

During the July-September FAD prohibition periods in each of 2016 and 2017, after the 2,522 FAD set limit is reached in 2016 or 2017 (until the end of the respective calendar year), and on the high seas throughout 2017, owners, operators, and crew of fishing vessels of the United States are prohibited from doing any of the following activities in the Convention Area in the area between 20° N. latitude and 20° S. latitude:

- 1) Set a purse seine around a FAD or within one nautical mile of a FAD.

- 2) Set a purse seine in a manner intended to capture fish that have aggregated in association with a FAD or a vessel, such as by setting the purse seine in an area from which a FAD or a vessel has been moved or removed within the previous eight hours, setting the purse seine in an area in which a FAD has been inspected or handled within the previous eight hours, or setting the purse seine in an area into which fish were drawn by a vessel from the vicinity of a FAD or a vessel.

- 3) Deploy a FAD into the water.

- 4) Repair, clean, maintain, or otherwise service a FAD, including any electronic equipment used in association with a FAD, in the water or on a vessel while at sea, except that: a FAD may be inspected and handled as needed to identify the FAD, identify and release incidentally captured animals, un-foul fishing gear, or prevent damage to property or risk to human safety; and a FAD may be removed from the water and if removed may be cleaned, provided that it is not returned to the water.

- 5) From a purse seine vessel or any associated skiffs, other watercraft or

equipment, submerge lights under water; suspend or hang lights over the side of the purse seine vessel, skiff, watercraft or equipment, or direct or use lights in a manner other than as needed to illuminate the deck of the purse seine vessel or associated skiffs, watercraft or equipment, to comply with navigational requirements, and to ensure the health and safety of the crew. These prohibitions do not apply during emergencies as needed to prevent human injury or the loss of human life, the loss of the purse seine vessel, skiffs, watercraft or aircraft, or environmental damage.

3. Longline bigeye tuna catch limits for 2016-2017

This final rule establishes limits on the amount of bigeye tuna that may be caught in the Convention Area by U.S. fishing vessels using longline gear in each of 2016 and 2017. The limit for 2016 is 3,554 mt, and the limit for 2017 is 3,345 mt. If NMFS later determines that there was an overage of the limit for 2016, NMFS will adjust the 2017 limit in accordance with the provisions of CMM 2015-01 and any other pertinent Commission decisions in force at the time.

The 2016 and 2017 longline bigeye tuna catch limits apply only to U.S.-flagged longline vessels operating as part of the U.S. longline fisheries. The limits do not apply to U.S. longline vessels operating as part of the longline fisheries of American Samoa, the Commonwealth of the Northern Mariana Islands, or Guam, which are U.S. Participating Territories in the Commission. Existing regulations at 50 CFR 300.224(b), (c), and (d) detail the manner in which longline-caught bigeye tuna is attributed among the fisheries of the United States and the U.S. Participating Territories.

The catch limits will be measured in terms of retained catches—that is, bigeye tuna that are caught by longline gear and retained on board the vessel.

As set forth under the existing regulations at 50 CFR 300.224(e), if NMFS determines that the 2016 or 2017 limit is expected to be reached before the end of the respective calendar year, NMFS will publish a notice in the **Federal Register** to announce specific fishing restrictions that will be effective from the date the limit is expected to be reached until the end of that calendar year. NMFS will publish the notice of the restrictions at least 7 calendar days before the effective date to provide vessel owners and operators with advance notice. Periodic forecasts of the date the limit is expected to be reached will be made available to the public on the Web site of the NMFS Pacific Islands Regional Office, at www.fpir.noaa.gov/SFD/SFD_regs_3.html, to help vessel owners and operators plan for the possibility of the limit being reached.

As set forth under the existing regulations at 50 CFR 300.224(f), if the 2016 or 2017 limit is reached, the following restrictions will go into effect:

1) Retaining on board, transshipping, or landing bigeye tuna: Starting on the effective date of the restrictions and extending through December 31 of the applicable year, it will be prohibited to use a U.S. fishing vessel to retain on board, transship, or land bigeye tuna captured in the Convention Area by longline gear, with three exceptions, as described below.

First, any bigeye tuna already on board a fishing vessel upon the effective date of the restrictions may be retained on board, transshipped, and/or landed, provided that they are landed within 14 days after the restrictions become effective. A vessel that had declared to NMFS pursuant to 50 CFR 665.803(a) that the current trip type is shallow-setting will not be subject to this 14-day landing restriction, so these vessels will be able to land bigeye tuna more than 14 days after the restrictions become effective.

Second, bigeye tuna captured by longline gear may be retained on board, transshipped, and/or landed if they are caught by a fishing vessel registered for use under a valid American Samoa Longline Limited Access Permit, or if they are landed in American Samoa, Guam, or the CNMI. However, the bigeye tuna must not be caught in the portion of the U.S. exclusive economic zone (EEZ) surrounding the Hawaiian Archipelago, and must be landed by a U.S. fishing vessel operated in compliance with a valid permit issued under 50 CFR 660.707 or 665.801.

Third, bigeye tuna captured by longline gear may be retained on board, transshipped, and/or landed if they are caught by a vessel that is included in a valid specified fishing agreement under 50 CFR 665.819(d), in accordance with 50 CFR 300.224(f)(1)(iv).

2) Transshipping bigeye tuna to certain vessels: To the extent authorized under the prohibition described above on “retaining on board, transshipping, or landing bigeye tuna,” starting on the effective date of the restrictions and extending through December 31 of the applicable year, it will be prohibited to transship bigeye tuna caught by longline gear in the Convention Area to any vessel other than a U.S. fishing vessel operated in compliance with a valid permit issued under 50 CFR 660.707 or 665.801.

3) Fishing inside and outside the Convention Area: To help ensure compliance with the restrictions related to bigeye tuna caught by longline gear in the Convention Area, this final rule establishes two additional, related prohibitions that will go into effect starting on the effective date of the restrictions and extending through December 31 of the applicable year. First, vessels will be prohibited from fishing with longline gear both inside and outside the Convention Area during the same fishing trip, with the exception

of a fishing trip that is in progress at the time the announced restrictions go into effect. In the case of a fishing trip that is in progress at the time the restrictions go into effect, the vessel still must land any bigeye tuna taken in the Convention Area within 14 days of the effective date of the restrictions, as described above. Second, if a vessel is used to fish using longline gear outside the Convention Area and enters the Convention Area at any time during the same fishing trip, the longline gear on the fishing vessel must be stowed in a manner so as not to be readily available for fishing while the vessel is in the Convention Area. These two prohibitions will not apply to vessels on declared shallow-setting trips pursuant to 50 CFR 665.803(a), or vessels operating for the purposes of this rule as part of the longline fisheries of American Samoa, Guam, or the CNMI. This second group includes vessels registered for use under valid American Samoa Longline Limited Access Permits; vessels landing their bigeye tuna catch in one of the three U.S. Participating Territories, so long as these vessels conduct fishing activities in accordance with the conditions described above; and vessels included in a specified fishing agreement under 50 CFR 665.819(d), in accordance with 50 CFR 300.224(f)(1)(iv).

Comments and Responses

NMFS received several comments on the proposed rule. The comments are summarized below, followed by responses from NMFS.

Comment 1: I support the proposed regulations; they are logical steps towards sustainable use of international fisheries and will have a positive impact on these fisheries and will contribute to improving sustainability of tropical tuna stocks. Additionally, the regulations may set a new standard for other nations to improve regulations on these

important and vulnerable resources.

Response: NMFS acknowledges the comment.

Comment 2: The Hawaii Longline Association commented as follows on the proposed longline bigeye tuna catch limits for 2016-2017.

It is well established that the United States cannot end overfishing of bigeye tuna in the WCPO through unilateral actions, and unilateral suppression of U.S. commercial longline bigeye tuna fishing would be counterproductive to conservation of bigeye tuna and other species.

We understand that there was no overage of the U.S. longline bigeye tuna catch limit for 2015, so we expect the 2016 limit to be 3,554 mt, as in the proposed rule. If the 2016 limit is reached and a specified fishing agreement (under 50 CFR 665.819(c)) is effective and has been approved at the time the limit is reached, any fish landed immediately after the limit is reached should be attributed to the U.S. territory that is a party to the specified fishing agreement.

In 2015 the Hawaii deep-set longline fishery was closed for an extended period in the WCPO and a great many vessels had to cease fishing entirely—even though a specified fishing agreement had been executed—because NMFS’ issuance of territory specification regulations was delayed. We request that NMFS act promptly and with all due diligence in completing the territory specification rulemaking process in 2016.

Response: NMFS agrees that ending overfishing of bigeye tuna will require multilateral efforts by the countries involved in fisheries for the stock.

With respect to the 2015 longline bigeye tuna catch limit, the commenter’s understanding that there was no overage of the 2015 limit is correct. NMFS explained in

the proposed rule that if, after publishing the proposed rule, NMFS determines that there was an overage in 2015, NMFS would adjust the 2016 limit as follows: an amount equal to the overage would be subtracted from 3,554 mt to determine the annual limit for 2016. Since publication of the proposed rule, NMFS has determined that there was no overage of the 2015 limit. As a result, the limit for 2016, as established in this final rule, is unchanged from the proposed limit, 3,554 mt.

With respect to what will occur if the 2016 longline bigeye tuna limit is reached, bigeye tuna caught by vessels included in specified fishing agreements under 50 CFR 665.819(c) will be attributed among fisheries according to the existing criteria and procedures at 50 CFR 300.224(d) and 665.819, which are not revised by this final rule. NMFS emphasizes that whether a given bigeye tuna will be attributed to the U.S. territory that is party to a specified fishing agreement will depend on, among other things, the start date for the agreement as determined under 50 CFR 665.819(c)(9).

With respect to the issuance of specifications related to longline bigeye tuna catch limits for the U.S. territories and specified fishing agreements for 2016, NMFS acknowledges the comment and will undertake the rulemaking process in accordance with applicable laws and regulations.

Comment 3: The Center for Biological Diversity (CBD) submitted comments stating that it has a strong interest in eliminating fisheries impacts on marine mammals protected under the Marine Mammal Protection Act (MMPA), as well as marine species listed under the Endangered Species Act (ESA).

In support of its comments, CBD stated that WCPO fisheries involve primarily purse seine and longline fishing, targeting bigeye, yellowfin, and skipjack tuna species,

but that bycatch in these fisheries is common, sometimes accounting for more than 30 percent of a ship's annual haul. CBD stated that every year, fishing fleets are known to ensnare species protected under the MMPA and ESA as part of their fishing operation, but observers on U.S. vessels only conduct limited identification and reporting of impacts to protected marine mammals and sea turtles, and observers remain undertrained for this task. CBD noted that the Biological Opinion on the Effects of the U.S. Tuna Purse Seine Fishery in the Western and Central Pacific Ocean on Listed Sea Turtles and Marine Mammals (2006 BiOp) described limitations on observer data collected for the U.S. purse seine fishery operating in the WCPO regarding the specific protected species with which the fishery interacts. Due to the limitations on the data, the 2006 BiOp did not estimate the total number of marine mammals projected to be captured each year, and NMFS did not set a take limit for these species. CBD noted that according to the 2006 BiOp, four of the 12 recorded capture events between 1997 and 2004 involved interactions with whale species, possibly involving multiple individuals each time.

Response: NMFS acknowledges that there were limitations in available data during completion of the 2006 BiOp. Beginning in 2010, however, consistent with WCPFC conservation and management measures, the U.S. WCPO purse seine fishery has been subject to increased observer coverage requirements adopted by the WCPFC. With this increased observer coverage, more robust data have become available. NMFS reinitiated formal ESA Section 7 consultation for the WCPO purse seine fishery for the effects of the fishery on the recently listed Indo-West Pacific Distinct Population Segment (DPS) of the scalloped hammerhead shark, and we expect completion of formal consultation for that species by the end of 2016. NMFS also is developing a biological

assessment for the U.S. WCPO purse seine fishery in anticipation of reinitiating ESA Section 7 consultation for one or more other species, as may be warranted, based on raw observer data recently obtained from the Pacific Islands Forum Fisheries Agency (FFA), located in Honiara, Solomon Islands.

Comment 4: CBD submitted comments stating that in the 2006 BiOp, NMFS estimated that purse seining in the WCPO would take 61 sea turtles annually, and possibly as many as 122. In addition to being caught in nets, NMFS also determined in the 2006 BiOp that ship strikes remain a risk to both sea turtles and marine mammals, though the 2006 BiOp failed to estimate the number of individuals that may be taken in this manner or to set take limits based on assumptions regarding the risk of ship strikes.

Response: The 2006 BiOp provides information on worldwide ship strikes of whales, but indicates that there were no recorded ship strikes in the action area and that observer data for the U.S. WCPO purse seine fishery available at the time indicated that interactions with large whales, including ESA-listed species, were relatively uncommon in both the action area and throughout the Pacific Ocean. According to the 2006 BiOp, of the 292 recorded ship strikes from the years 1975 to 2002, 134 incidents had a known vessel type and fishing vessels were responsible for four of those 134 ship strikes. Thus, NMFS determined that the probability of a vessel in the U.S. WCPO purse seine fishery colliding with listed whale species was low in the action area.

The 2006 BiOp also states that relative to other threats, vessel collisions are not considered a current problem for sea turtle species in the action area, with the possible exception of green and hawksbill turtles in Hawaii and green turtles in Palau. The 2006 BiOp indicates that there are no reports of ship strikes of the U.S. WCPO purse seine

fishery on sea turtles. Moreover, the 2006 BiOp states that data regarding sea turtles in the U.S. WCPO purse seine fishery available at the time indicate that all sea turtles caught in nets were released alive.

Comment 5: CBD submitted comments stating that in order for reporting to be meaningful and effective, NMFS must ensure observers are properly trained and that they provide accurate, reliable reports of protected animals taken down to the species level. According to CBD, the 2006 BiOp and the PEA highlight that the quality of purse seine observer data is unacceptably low. Moreover, CBD stated, one of the enforceable terms and conditions in the BiOp is to improve data collection, as NMFS mandated that the agency work to ensure that observers collect standardized information regarding the incidental capture, injury, and mortality of sea turtles including species, gear and set information for each interaction that occurs. That NMFS has no observer data regarding protected species is evidence that this term and condition has not been met. CBD stated that to ensure compliance with the ESA, the observer program must have a separate and equal focus of recording and reporting adequate information on the species taken, the number of impacted individuals in each observed take event, and all observed impacts to these individuals, in light of the low threshold for take. Without this information, it is impossible for NMFS to ensure that the WCPO fishery participants are adhering to the terms of its 2006 Incidental Take Statement (ITS). Additionally, observers should not myopically focus only on net-related take events; instead, they also should be trained and ordered to report on all observed take events, including ship strikes, as other take events may be a significant yet unreported portion of the incidental take within this fishery.

Response: As stated above, beginning in 2010, the U.S. WCPO purse seine

fishery has been subject to increased observer coverage requirements adopted by the WCPFC. These observers are deployed by FFA and must undergo specialized training and certifications. FFA observers also have been authorized by the WCPFC to function as WCPFC observers and so meet the training and certification requirements of the WCPFC's Regional Observer Programme. NMFS has provided financial resources to the FFA to support the augmentation of the FFA observer training curriculum to focus on better identification of species of special concern, which include but are not limited to marine mammals, marine reptiles, sharks, and seabirds. FFA-deployed observers on U.S. purse seine vessels have collected specific information on all protected species interactions since 2008. This information is not focused solely on net-related take events. Preliminary raw data are currently available from 2008 to 2014. This raw observer data recently received from the FFA indicates low levels of interactions with some protected species since 2008. This data is currently being analyzed for management use. NMFS is continuing to work with FFA to obtain verified data closer to real-time in accordance with the ITS specified in the 2006 BiOp and the terms and condition of the 2006 BiOp. As stated above, NMFS also is developing a biological assessment for the U.S. WCPO purse seine fishery in anticipation of reinitiating ESA Section 7 consultation for one or more species (other than the Indo-West Pacific DPS of the scalloped hammerhead shark), as may be warranted, based on the observer data recently obtained from FFA.

Comment 6: CBD also provided comments stating that it is crucial that NMFS annually make observer reports available to the public. The last time NMFS made these data available was in the 2006 BiOp, prior to the transition to 100 percent observer coverage. Without these observer data, it is impossible for concerned citizens, scientists,

or organizations to evaluate adherence to or the effectiveness of any conservation measures NMFS has proposed and is authorized to enforce. Publishing this information would make it possible for interested parties to independently judge the quality of observer data, and, over the years, track any improvement or decline in the quality of this information. For these reasons and others, it is important that NMFS provide access to this information on a regular basis.

Response: Observer data collected by the FFA observer program are subject to confidential handling under various authorities, including but not limited to the Privacy Act, 5 U.S.C. § 552a; Trade Secrets Act, 18 U.S.C. § 1905; Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 et seq.; Marine Mammal Protection Act, 16 U.S.C. § 1361, et seq.; South Pacific Tuna Act, 16 U.S.C. § 973; and Endangered Species Act, 16 U.S.C. § 1531, et seq. NMFS endeavors to make information on protected species impacts accessible to the public, but in a format that does not compromise the confidentiality of non-public domain data, or violate the United States' international obligations. NMFS further notes that the dissemination of observer data is outside the scope of this rulemaking.

Comment 7: CBD provided comments stating that NMFS should reinstate ESA Section 7 consultation for the U.S. WCPO purse seine fishery, based on events and conditions occurring after NMFS finalized its 2006 BiOp. According to CBD, the PEA incorrectly states that the U.S. purse seine fishery operating in the WCPO has had limited interactions with marine mammals in recent years and the number of these interactions and whether the marine mammals were ESA-listed species is unknown at this time. CBD states that the 2006 BiOp includes references to recorded impacts to ESA-listed whales

and sea turtles and is evidence that NMFS anticipates future take, by virtue of the incidental take limits set for each species of sea turtle that occurs within the Convention Area. In addition, since 2006, fishing effort has increased dramatically, which requires reinitiation of consultation and revision of the 2006 BiOp. Since 2006, the U.S. WCPO purse seine fishery has increased both in the number of vessels participating and in the total tonnage of fish caught, so the fishery is likely operating in a manner that exceeds the take limits set for each sea turtle species in the 2006 BiOp. The new relaxed fishing vessel registration policy, the four-fold increase in the number of U.S. fishing vessels, and the two-fold increase in fishing effort are more than sufficient to trigger reinitiation of Section 7 consultation. Moreover, the recent changes to the listing status of green and loggerhead turtles trigger reinitiation of consultation. The new DPS for these species contain new information that may affect listed species in a manner or to an extent not previously considered.

Response: NMFS acknowledges CBD's comments. As stated above, observers deployed by the FFA on U.S. purse seine vessels operating in the WCPO currently collect detailed information on incidentally caught species, discards and interactions with species of special interest, including species protected under the ESA and MMPA. Since 2010, there has been observer coverage on virtually 100 percent of U.S. purse seine fishing trips in the Convention Area. NMFS is continuing to analyze the observer-collected data for recent years—that is, for years subsequent to the data used for the completion of the 2006 BiOp. NMFS has reinitiated ESA Section 7 consultation on the effects of the U.S. WCPO purse seine fishery on the Indo-West Pacific DPS of the scalloped hammerhead shark and, as indicated in the SIR, expects that consultation to be completed by the end of

2016. NMFS also is developing a biological assessment for the U.S. WCPO purse seine fishery in anticipation of reinitiating ESA Section 7 consultation for one or more other species under the jurisdiction of NMFS and any new ITS for ESA-listed species will be based on the completed analysis of the best available information. Observer-collected data would be made available, as appropriate, to the public in nonconfidential form through the publication of any Biological Opinion for the fishery.

NMFS acknowledges that the number of vessels participating in the fishery has returned to historic levels since the 2006 BiOp was completed, and the current number of active vessels and the number of sets per year is more similar to the historic activity of the fleet in the late 1990s (see Table 2 of the PEA). However, the number of available licenses from FFA for the fleet that was analyzed within the PEA remains the same, the area where the fishery operates remains essentially the same, and the fishing techniques remain the same. As stated above, NMFS has reinitiated ESA Section 7 consultation on the effects of the U.S. WCPO purse seine fishery on the Indo-West Pacific DPS of the scalloped hammerhead shark and as indicated in the SIR, expects that consultation to be completed by the end of 2016. NMFS also is developing a biological assessment for the U.S. WCPO purse seine fishery in anticipation of reinitiating ESA Section 7 consultation for one or more other species under the jurisdiction of NMFS, as applicable, based on observer data recently obtained from the FFA.

Comment 8: CBD provided comments stating that in its new BiOp, NMFS must set a take limit for any ESA-listed marine mammals that occur within the Convention Area. In the 2006 BiOp, NMFS acknowledged that whales have interacted with nets and risk being struck by fishing vessels, but despite this, the 2006 BiOp failed to set a take

limit for listed whale species. Contrary to the conclusions in the 2006 BiOp, any interaction with fishing gear constitutes a take within the meaning of the ESA, and take limits must be set accordingly. Furthermore, NMFS should consider take not only based off of net interactions, but also from probable ship strikes. Considering the real risk of these impacts, it is important for NMFS to reevaluate the risk of take, especially in light of the four-fold increase in U.S. fishing vessels and two-fold increase in fishing effort since NMFS published its WCPO BiOp in 2006. To issue a take limit for ESA-listed marine mammals, NMFS must first issue an MMPA authorization. The MMPA places a moratorium on the taking of marine mammals, and only under limited exceptions to this moratorium may NMFS allow take incidental to commercial fishing operations. NMFS must authorize vessels' take of threatened or endangered marine mammals during a period of up to three years after making a finding of negligible impact and finding that other MMPA requirements are met. NMFS cannot issue such authorization without a thorough analysis of the impacts of the fishery on the listed marine mammals. Thus, adequate monitoring of marine mammal mortality is necessary for continued operation of the fishery.

Response: As stated above, NMFS is developing a biological assessment for the U.S. WCPO purse seine fishery in anticipation of reinitiating ESA Section 7 consultation for one or more other species under the jurisdiction of NMFS, based on recently obtained raw observer data from the FFA. NMFS will analyze the effects of the fishery on any ESA-listed species, including marine mammals, in the action area and develop ITS, as appropriate, based on the best available data. NMFS notes that some of the marine mammal species present in the action area are not ESA-listed or depleted under the

MMPA. The U.S. WCPO purse seine fishery has been designated as a Category II fishery under the regulations that govern the incidental take of marine mammals during fishing operations under the MMPA. This means that the fishery is considered to result in occasional serious injuries and mortalities to marine mammals. NMFS is continuing to analyze observer-collected data, as well as other available data, and will follow the process to obtain the appropriate permits under the MMPA if they indicate that incidental takes of ESA-listed marine mammals have occurred in the U.S. WCPO purse seine fishery.

Changes from Proposed Rule

No changes from the proposed regulations have been made in these final regulations.

Classification

The Administrator, Pacific Islands Region, NMFS, has determined that this final rule is consistent with the WCPFC Implementation Act and other applicable laws.

Administrative Procedure Act

There is good cause under 5 U.S.C. 553(d)(3) to establish an effective date less than 30 days after date of publication for the purse seine FAD restrictions and the 2016 longline bigeye tuna catch limit. NMFS must establish the FAD restrictions by July 1, 2016, to comply with the provisions of CMM 2015-01. With respect to the longline bigeye tuna catch limit, NMFS' latest forecast indicates that the 2016 limit of 3,554 mt could be reached in the latter half of July. Also, in the event the catch limit is expected to be reached, the regulations at 50 CFR 300.224(e) provide for NMFS to publish the notice announcing fishing prohibitions at least seven days in advance of the date the

prohibitions go into effect. Thus, there would be substantial risk of the 2016 longline bigeye tuna catch limit being exceeded if this rule is not made effective by July 1, 2016. The FAD restrictions and longline bigeye tuna catch limits are intended to reduce or otherwise control fishing pressure on bigeye tuna in the WCPO in order to restore this stock to levels capable of producing maximum sustainable yield on a continuing basis. According to the NMFS stock status determination criteria, bigeye tuna in the Pacific Ocean is currently experiencing overfishing. Failure to establish the FAD restrictions and the 2016 longline bigeye tuna catch limit by July 1, 2016, would result in additional fishing pressure on this stock, and would be inconsistent with CMM 2015-01. Thus, NMFS finds that delaying the effective date of the FAD restrictions and the 2016 longline bigeye tuna catch limit past July 1, 2016, would be contrary to the public interest.

Executive Order 12866

This final rule has been determined to be not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act (RFA)

A final regulatory flexibility analysis (FRFA) was prepared as required by section 604 of the RFA. The FRFA incorporates the initial regulatory flexibility analysis (IRFA) prepared for the proposed rule. The analysis in the IRFA is not repeated here in its entirety. A description of the action, why it is being considered, and the legal basis for this action are contained in the **SUMMARY** section of the preamble and in other sections of this **SUPPLEMENTARY INFORMATION** section of this final rule, above. The analysis follows:

Significant Issues Raised by Public Comments in Response to the IRFA

NMFS did not receive any comments on the IRFA, but the Hawaii Longline Association provided comments on the economic impacts of the longline bigeye tuna catch limit established in a previous rule, for 2015, and requested that NMFS act promptly and with all due diligence in completing the territory specification rulemaking process in 2016 (see comment 2 and NMFS' response, above).

Description of Small Entities to Which the Rule Will Apply

Small entities include “small businesses,” “small organizations,” and “small governmental jurisdictions.” The Small Business Administration (SBA) has established size standards for all major industry sectors in the United States, including commercial finfish harvesters (NAICS code 114111). A business primarily involved in finfish harvesting is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of \$20.5 million for all its affiliated operations worldwide.

The final rule applies to owners and operators of U.S. purse seine and longline vessels used for fishing for HMS in the Convention Area. The number of purse seine vessels affected by the rule is approximated by the number with WCPFC Area Endorsements, which are the NMFS-issued authorizations required to use a vessel to fish commercially for HMS on the high seas in the Convention Area. As of May 2016 the number of purse seine vessels with WCPFC Area Endorsements was 41.

The final rule applies to U.S. longline vessels used to fish for HMS in the Convention Area, except those operating as part of the longline fisheries of American Samoa, the CNMI, or Guam. The total number of affected longline vessels is approximated by the number of vessels with Hawaii Longline Limited Access Permits

(issued under 50 CFR 665.13), although some such vessels might be able to operate as part of the longline fisheries of the U.S. Participating Territories and thus not be affected. Under the Hawaii longline limited access program, no more than 164 permits may be issued. During 2006-2012 the number of permitted vessels ranged from 130 to 145. The number of permitted vessels as of April 2016 was 139. U.S. longline vessels based on the U.S. west coast without Hawaii Longline Limited Access Permits also could be affected by this rule if they fish in the Convention Area. However, the number of such vessels is very small and fishing in the Convention Area by such vessels is rare, so it is expected that very few, if any, such vessels will be affected.

Most of the Hawaii longline fleet targets bigeye tuna using deep sets, and during certain parts of the year, portions of the fleet target swordfish using shallow sets. In the years 2005 through 2013, the estimated numbers of Hawaii longline vessels that actually fished ranged from 124 to 135. Of the vessels that fished, the number of vessels that engaged in deep-setting in the years 2005 through 2013 ranged from 122 to 135, and the number of vessels that engaged in shallow-setting ranged from 15 to 35. The number of vessels that engaged in both deep-setting and shallow-setting ranged from 15 to 35. The number of vessels that engaged exclusively in shallow-setting ranged from zero to two.

Based on limited available financial information about the affected fishing vessels and the SBA's small entity size standards for commercial finfish harvesters, and using individual vessels as proxies for individual businesses, NMFS believes that all the affected fish harvesting businesses—in both the purse seine and longline sectors—are small entities. NMFS used estimates of average per-vessel returns over recent years to estimate annual revenue, because gross receipts and ex-vessel price information specific

to the individual affected vessels are not available to NMFS.

For the affected purse seine vessels, 2013 is the most recent year for which complete catch data are available, and NMFS estimates that the average annual receipts over 2011-2013 for each purse seine vessel were less than the \$20.5 million threshold for finfish harvesting businesses. The greatest was about \$20 million, and the average was about \$12 million. This is based on the estimated catches of each vessel in the purse seine fleet during that period, and indicative regional cannery prices developed by the FFA (available at <https://www.ffa.int/node/425>). Since 2013, cannery prices for purse seine-caught tuna have declined dramatically, so the vessels' revenues in 2014 and 2015 very likely declined as well.

For the longline fishery, the ex-vessel value of catches in the Hawaii longline fishery in 2013 was about \$0.7 million per vessel, on average, well below the \$20.5 million threshold for finfish harvesting businesses.

Recordkeeping, Reporting, and Other Compliance Requirements

The recordkeeping, reporting, and other compliance requirements are discussed below for each element of the final rule, as described earlier in the **SUPPLEMENTARY INFORMATION** section of the preamble. Fulfillment of these requirements is not expected to require any professional skills that the affected vessel owners and operators do not already possess. The costs of complying with the requirements are described below to the extent possible:

1. Purse seine observer requirements

This element of the final rule does not establish any new reporting or recordkeeping requirements. The new compliance requirement is for affected vessel

owners and operators to carry WCPFC observers on all fishing trips in the Convention Area between the latitudes of 20° N. and 20° S., with the exception of fishing trips during which any fishing in the Convention Area takes place entirely within areas under the jurisdiction of a single nation other than the United States. The expected costs of complying with this requirement are described below.

Under the South Pacific Tuna Treaty (SPTT), U.S. purse seine vessels operating in the Treaty Area (which is almost entirely in the Convention Area) are required to carry observers on about 20 percent of their fishing trips, which equates to roughly one trip per year per vessel. The observers required under the terms of the SPTT are deployed by the FFA, which acts as the SPTT Administrator on behalf of the Pacific Island Parties to the SPTT. The FFA observer program has been authorized to be part of the WCPFC observer program, so FFA-deployed observers are also WCPFC observers. Thus, in a typical year for a typical U.S. purse seine vessel, the cost of carrying observers to satisfy requirements under the SPTT can be expected to constitute 20 percent of the costs of the requirement in this rule. However, recent events associated with the SPTT make 2016 an atypical year. Because of late negotiations among the SPTT parties on the terms of access in foreign zones in the SPTT Area for 2016, no U.S. vessels were licensed under the SPTT until March of 2016, and thus none were authorized to fish in foreign zones or on the high seas in the Treaty Area until then. The terms of access for future years, and the SPTT itself, are uncertain. Given this uncertainty, an upper-bound estimate of the costs of compliance is provided here. For this purpose, it is assumed that fishing patterns in the Convention Area will be similar to the pattern in recent years, and that observer coverage

under the terms of the SPTT will not contribute at all to the costs of complying with this requirement.

Based on the U.S. purse seine fleet's fishing patterns in 2011-2013, it is expected that each vessel will spend about 252 days at sea per year, on average, with some vessels spending as many as about 354 days at sea per year.

The compliance costs of the requirement can be broken into two parts: 1) the costs of providing food, accommodation, and medical facilities to observers (observer accommodation costs); and 2) the fees imposed by observer providers for deploying observers (observer deployment costs). Observer accommodation costs are expected to be about \$20 per vessel per day-at-sea.

With respect to observer deployment costs, affected fishing companies can use observers from any program that has been authorized by the Commission to be part of the WCPFC Regional Observer Programme. In other words, they are not required to use FFA observers, which they have traditionally used until now. Nonetheless, the costs of deploying FFA observers are probably good indications of observer deployment costs in the region generally, and they are used for this analysis. Based on budgets and arrangements for the deployment of observers under the FFA observer program, observer deployment costs are expected to be about \$230 per vessel per day-at-sea. Thus, combined observer accommodation costs and observer deployment costs are expected to be about \$250 per vessel per day-at-sea. For the average vessel, which is expected to spend about 252 days at sea per year, the total cost of compliance are therefore expected to be about \$63,000 per year. The cost for vessels that spend fewer days at sea will be accordingly less. At the other extreme, if a vessel spends 354 days at sea (the top of the

range in 2011-2013), the total cost of compliance will be about \$88,500 per year. Both of these figures are upper-bound estimates. If arrangements under the SPTT return to something like they have been in the past, then the numbers of days spent at sea on fishing trips in the Convention Area are likely to be close to the levels described above, but the compliance costs will be about 20 percent less than estimated above because observer coverage under the SPTT will satisfy about 20 percent of the coverage required under this rule. If arrangements under the SPTT do not return to something like they have been in the recent past, then the number of days spent at sea on fishing trips in the Convention Area could be substantially lower than as described above, and the costs of complying with this requirement will be accordingly less.

2. Purse seine FAD restrictions for 2016-2017

This element of the final rule does not establish any new reporting or recordkeeping requirements. The new requirement is for affected vessel owners and operators to comply with the FAD restrictions described earlier in the **SUPPLEMENTARY INFORMATION** section of the preamble, including FAD prohibition periods from July 1 through September 30 in each of 2016 and 2017; limits of 2,522 FAD sets that may be made in each of 2016 and 2017; and prohibitions on specific uses of FADs on the high seas in 2017. The expected costs of complying with this requirement are described below to the extent possible.

The FAD restrictions will substantially constrain the manner in which purse seine fishing can be conducted in the specified areas and periods in the Convention Area; in those areas and during those periods, vessels will be able to set only on free, or “unassociated,” schools.

The costs associated with the FAD restrictions cannot be quantitatively estimated, but the fleet's historical use of FADs can give a qualitative indication of the costs. In the years 1997-2013, the proportion of sets made on FADs in the U.S. purse seine fishery ranged from less than 30 percent in some years to more than 90 percent in others. Thus, the importance of FAD sets in terms of profits appears to be quite variable over time, and is probably a function of many factors, including fuel prices (unassociated sets involve more searching time and thus tend to bring higher fuel costs than FAD sets) and market conditions (e.g., FAD fishing, which tends to result in greater catches of lower-value skipjack tuna and smaller yellowfin tuna and bigeye tuna than unassociated sets, might be more attractive and profitable when canneries are not rejecting small fish). Thus, the costs of complying with the FAD restrictions will depend on a variety of factors.

In 2010-2013, the last 4 years for which complete data are available and for which there was 100 percent observer coverage, the U.S. WCPO purse seine fleet made about 39 percent of its sets on FADs. During the months when setting on FADs was allowed, the percentage was about 58 percent. The fact that the fleet has made such a substantial portion of its sets on FADs indicates that prohibiting the use of FADs in the specified areas and periods could bring substantial costs and/or revenue losses.

To mitigate these impacts, vessel operators might choose to schedule their routine vessel and equipment maintenance during the FAD prohibition periods. However, the limited number of vessel maintenance facilities in the region might constrain vessel operators' ability to do this. It also is conceivable that some vessels might choose not to fish at all during the FAD prohibition periods rather than fish without the use of FADs. Observations of the fleet's behavior in 2009-2013, when FAD prohibition periods were in

effect, do not suggest that either of these responses occurred to an appreciable degree.

The proportion of the fleet that fished during the two- and three-month FAD prohibition periods of 2009-2013 did not appreciably differ from the proportion that fished during the same months in the years 1997-2008, when no FAD prohibition periods were in place.

The FAD restrictions for 2016 are similar to those in place in 2013-2015, except that there is a limit of 2,522 FAD sets instead of the October FAD prohibition period that was in place in 2013-2015. 2016 is an unusual year in that SPTT licenses for 2016 were not issued until March, and the number of licensed vessels (34 as of May 2016) is fewer than in recent years. Thus, the level of purse seine fishing effort to date in the Convention Area in 2016 is somewhat lower than typical levels in recent years. As a result, the expected amount of fishing effort in the Convention Area in 2016 is expected to be substantially less than in recent years. Consequently, the 2,522 FAD set limit will be less constraining than it would be if fishing effort were greater. For example, if total fishing effort in 2016 is 5,000 fishing days (about 62% of the average in 2010-2013), and the average number of sets made per fishing day is the same as in 2010-2013 (0.97), and the average number of all sets that are FAD sets (“FAD set ratio”) during periods when FAD sets are allowed is the same as in 2010-2013 (58%), and if fishing effort is evenly distributed through the year, then the number of FAD sets expected in 2016 under the final rule will be about 2,130, somewhat less than the limit of 2,522. Under the assumptions described above, the limit of 2,522 FAD sets will start to become constraining at a total fishing effort level of 5,900 fishing days.

The effects of the FAD restrictions in 2017 will likely be greater than in 2016 because of the additional prohibition on setting on FADs on the high seas. The magnitude

of that additional impact cannot be predicted, but as an indication of the additional impact, in 2010-2013, about 10 percent of the fleet's fishing effort occurred on the high seas. As in 2016, the impact of the 2,522 FAD set limit in 2017 will be primarily a function of the fleet's total level of fishing effort. Given the uncertainty related to the future of the SPTT, fishing effort in 2017 is very difficult to predict. As described above for 2016, the limit will start to become constraining at a fishing effort level of about 5,900 fishing days, but in 2017 that threshold will be applicable only in the portion of the Convention Area that is not high seas (again, about 10 percent of fishing effort has occurred on the high seas in recent years).

In summary, the economic impacts of the FAD prohibition periods and FAD set limits in 2016 and 2017 and the prohibition on using FADs on the high seas throughout 2017 cannot be quantified, but they could be substantial. Their magnitude will depend in part on market conditions, oceanic conditions, and the fleet's fishing effort in 2016 and 2017, which will be determined in part by any limits on allowable levels of fishing effort in foreign EEZs and on the high seas in the Convention Area.

3. Longline bigeye tuna catch limits for 2016-2017

This element of the final rule will not establish any new reporting or recordkeeping requirements. The new compliance requirement is for affected vessel owners and operators to cease retaining, landing, and transshipping bigeye tuna caught with longline gear in the Convention Area if and when the bigeye tuna catch limit is reached in 2016 (3,554 mt) or 2017 (3,345 mt), for the remainder of the calendar year, subject to the exceptions and provisos described in other sections of this

SUPPLEMENTARY INFORMATION section of the preamble. Although the

restrictions that will come into effect in the event the catch limit is reached will not prohibit longline fishing, *per se*, they are sometimes referred to in this analysis as constituting a fishery closure. The costs of complying with this requirement are described below to the extent possible.

Complying with this element of the final rule could cause foregone fishing opportunities and result in associated economic losses in the event that the bigeye tuna catch limit is reached in 2016 or 2017 and the restrictions on retaining, landing, and transshipping bigeye tuna are imposed for portions of either or both of those years. These costs cannot be projected quantitatively with any certainty. The limits of 3,554 mt for 2016 and 3,345 mt for 2017 can be compared to catches in 2005-2008, before limits were in place. The average annual catch in that period was 4,709 mt. Based on that history, as well as fishing patterns in 2009-2015, when limits were in place, there appears to be a relatively high likelihood of the limits being reached in 2016 and 2017. 2015 saw exceptionally high catches of bigeye tuna. Although final estimates for 2015 are not available, the limit of 3,502 mt was estimated to have been reached by, and the fishery was closed on, August 5 (see temporary rule published July 28, 2015; 80 FR 44883). The fishery was subsequently re-opened for vessels included in agreements with the governments of the CNMI and Guam under regulations implementing Amendment 7 to the Fishery Ecosystem Plan for Pelagic Fisheries of the Western Pacific Region (Pelagics FEP) (50 CFR 665.819). If bigeye tuna catch patterns in 2016 or 2017 are like those in 2005-2008, the limits will likely be reached in the fourth quarter of the year. If catches are more accelerated, as in 2015, the limits could be reached in the third quarter of the year.

If the bigeye tuna limit is reached before the end of 2016 or 2017 and the Convention Area longline bigeye tuna fishery is consequently closed for the remainder of the calendar year, it can be expected that affected vessels would shift to the next most profitable fishing opportunity (which might be not fishing at all). Revenues from that next best alternative activity reflect the opportunity costs associated with longline fishing for bigeye tuna in the Convention Area. The economic cost of the rule would not be the direct losses in revenues that would result from not being able to fish for bigeye tuna in the Convention Area, but rather the difference in benefits derived from that activity and those derived from the next best activity. The economic cost of the rule on affected entities is examined here by first estimating the direct losses in revenues that would result from not being able to fish for bigeye tuna in the Convention Area as a result of the catch limit being reached. Those losses represent the upper bound of the economic cost of the rule on affected entities. Potential next-best alternative activities that affected entities could undertake are then identified in order to provide a (mostly qualitative) description of the degree to which actual costs would be lower than that upper bound.

Upper bounds on potential economic costs can be estimated by examining the projected value of longline landings from the Convention Area that would not be made as a result of reaching the limit. For this purpose, it is assumed that, absent this rule, bigeye tuna catches in the Convention Area in each of 2016 and 2017 would be 5,000 mt, slightly more than the average in 2005-2008. Under this scenario, imposition of limits of 3,554 mt for 2016 and 3,345 mt for 2017 would result in 29 percent and 33 percent less bigeye tuna being caught in those two years, respectively, than under no action. In the deep-set fishery, catches of marketable species other than bigeye tuna would likely be

affected in a similar way if vessels do not shift to alternative activities. Assuming for the moment that ex-vessel prices would not be affected by a fishery closure, under the rule, revenues in 2016 and 2017 to entities that participate exclusively in the deep-set fishery would be approximately 29 and 33 percent less than under no action in 2016 and 2017, respectively. Average annual ex-vessel revenues (from all species) per mt of bigeye tuna caught during 2005-2008 were about \$14,332/mt (in 2015 dollars, derived from the latest available annual report on the pelagic fisheries of the western Pacific Region (Western Pacific Regional Fishery Management Council, 2016, Pelagic Fisheries of the Western Pacific Region: 2013 Annual Report. Honolulu, Western Pacific Fishery Management Council). If there are 128 active vessels in the fleet, as there were during 2005-2008, on average, then under the no-action scenario of fleet-wide annual catches of 5,000 mt, each vessel would catch 39 mt/yr, on average. Reductions of 29 percent and 33 percent in 2016 and 2017, respectively, as a result of the limits would be about 11 mt and 13 mt, respectively. Applying the average ex-vessel revenues (from all species) of \$14,332 per mt of bigeye tuna caught, the reductions in ex-vessel revenue per vessel would be \$162,000 and \$185,000, on average, for 2016 and 2017, respectively.

In the shallow-set fishery, affected entities would bear limited costs in the event of the limit being reached (but most affected entities also participate in the deep-set fishery and might bear costs in that fishery, as described below). The cost would be about equal to the revenues lost from not being able to retain or land bigeye tuna captured while shallow-setting in the Convention Area, or the cost of shifting to shallow-setting in the eastern Pacific Ocean (EPO), which is to the east of 150 degrees W. longitude, whichever is less. In the fourth calendar quarters of 2005-2008, almost all shallow-setting effort took

place in the EPO, and 97 percent of bigeye tuna catches were made there, so the cost of a bigeye tuna fishery closure to shallow-setting vessels would appear to be very limited. During 2005-2008, the shallow-set fishery caught an average of 54 mt of bigeye tuna per year from the Convention Area. If the bigeye tuna catch limit is reached even as early as July 31 in 2016 or 2017, the Convention Area shallow-set fishery would have caught at that point, based on 2005-2008 data, on average, 99 percent of its average annual bigeye tuna catches. Imposition of the landings restriction at that point in 2016 or 2017 would result in the loss of revenues from approximately 0.5 mt (1 percent of 54 mt) of bigeye tuna, which, based on recent ex-vessel prices, would be worth no more than \$5,000. Thus, expecting about 26 vessels to engage in the shallow-set fishery (the annual average in 2005-2013), the average of those potentially lost annual revenues would be no more than \$200 per vessel. The remainder of this analysis focuses on the potential costs of compliance in the deep-set fishery.

It should be noted that the impacts on affected entities' profits would be less than impacts on revenues when considering the costs of operating vessels, because costs would be lower if a vessel ceases fishing after the catch limit is reached. Variable costs can be expected to be affected roughly in proportion to revenues, as both variable costs and revenues would stop accruing once a vessel stops fishing. But affected entities' costs also include fixed costs, which are borne regardless of whether a vessel is used to fish—e.g., if it is tied up at the dock during a fishery closure. Thus, profits would likely be adversely impacted proportionately more than revenues.

As stated previously, actual compliance costs for a given entity might be less than the upper bounds described above, because ceasing fishing would not necessarily be the

most profitable alternative opportunity when the catch limit is reached. Two alternative opportunities that are expected to be attractive to affected entities include: 1) deep-set longline fishing for bigeye tuna in the Convention Area in a manner such that the vessel is considered part of the longline fishery of American Samoa, Guam, or the CNMI; and 2) deep-set longline fishing for bigeye tuna and other species in the EPO. These two opportunities are discussed in detail below. Four additional opportunities are: 3) shallow-set longline fishing for swordfish (for deep-setting vessels that would not otherwise do so), 4) deep-set longline fishing in the Convention Area for species other than bigeye tuna, 5) working in cooperation with vessels operating as part of the longline fisheries of the Participating Territories – specifically, receiving transshipments at sea from them and delivering the fish to the Hawaii market, and 6) vessel repair and maintenance. A study by NMFS of the effects of the WCPO bigeye tuna longline fishery closure in 2010 (Richmond, L., D. Kotowicz, J. Hospital and S. Allen, 2015, Monitoring socioeconomic impacts of Hawai‘i’s 2010 bigeye tuna closure: Complexities of local management in a global fishery, *Ocean & Coastal Management* 106:87-96) did not identify the occurrence of any alternative activities that vessels engaged in during the closure, other than deep-setting for bigeye tuna in the EPO, vessel maintenance and repairs, and granting lengthy vacations to employees. Based on those findings, NMFS expects that alternative opportunities 3), 4), 5) and 6) are probably unattractive relative to the first two alternatives, and are not discussed here in any further detail. NMFS recognizes that vessel maintenance and repairs and granting lengthy vacations to employees are two alternative activities that might be taken advantage of if the fishery is closed, but no further analysis of their mitigating effects is provided here.

Before examining in detail the two potential alternative fishing opportunities that would appear to be the most attractive to affected entities, it is important to note that under the rule, once the limit is reached and the WCPO bigeye tuna fishery is closed, fishing with longline gear both inside and outside the Convention Area during the same trip would be prohibited (except in the case of a fishing trip that is in progress when the limit is reached and the restrictions go into effect). For example, after the restrictions go into effect, during a given fishing trip, a vessel could be used for longline fishing for bigeye tuna in the EPO or for longline fishing for species other than bigeye tuna in the Convention Area, but not for both. This reduced operational flexibility would bring costs, since it would constrain the potential profits from alternative opportunities. Those costs cannot be quantified.

A vessel could take advantage of the first alternative opportunity (deep-setting for bigeye tuna in a manner such that the vessel is considered part of the longline fishery of one of the three U.S. Participating Territories), by three possible methods : a) landing the bigeye tuna in one of the three Participating Territories, b) holding an American Samoa Longline Limited Access Permit, or c) being considered part of a Participating Territory's longline fishery, by agreement with one or more of the three Participating Territories under the regulations implementing Amendment 7 to the Pelagics FEP (50 CFR 665.819). In the first two circumstances, the vessel would be considered part of the longline fishery of the Participating Territory only if the bigeye tuna were not caught in the portion of the U.S. EEZ around the Hawaiian Islands and were landed by a U.S. vessel operating in compliance with a permit issued under the regulations implementing

the Pelagics FEP or the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species.

With respect to the first method of engaging in alternative opportunity 1 (1.a.) (landing the bigeye tuna in one of the Participating Territories), there are three potentially important constraints. First, whether the fish are landed by the vessel that caught the fish or by a vessel to which the fish were transshipped, the costs of a vessel transiting from the traditional fishing grounds in the vicinity of the Hawaiian Archipelago to one of the Participating Territories would be substantial. Second, none of these three locales has large local consumer markets to absorb substantial additional landings of fresh sashimi-grade bigeye tuna. Third, transporting the bigeye tuna from these locales to larger markets, such as markets in Hawaii, the U.S. west coast, or Japan, would bring substantial additional costs and risks. These cost constraints suggest that this alternative opportunity has limited potential to mitigate the economic impacts of the rule on affected small entities.

The second method of engaging in the first alternative opportunity (1.b.) (having an American Samoa Longline Limited Access Permit), would be available only to the subset of the Hawaii longline fleet that has both Hawaii and American Samoa longline permits (dual permit vessels). Vessels that do not have both permits could obtain them if they meet the eligibility requirements and pay the required costs. For example, the number of dual permit vessels increased from 12 in 2009, when the first WCPO bigeye tuna catch limit was established, to 20 in both 2011 and 2012. The previously cited NMFS study of the 2010 fishery closure (Richmond et al. 2015) found that bigeye tuna landings of dual permit vessels increased substantially after the start of the closure on

November 22, 2010, indicating that this was an attractive opportunity for dual permit vessels, and suggesting that those entities might have benefitted from the catch limit and the closure.

The third method of engaging in the first alternative opportunity (1.c.) (entering into an Amendment 7 agreement), was also available in 2011-2015 (in 2011-2013, under section 113(a) of Public Law 112-55, 125 Stat. 552 *et seq.*, the Consolidated and Further Continuing Appropriations Act, 2012, continued by Public Law 113-6, 125 Stat. 603, section 110, the Department of Commerce Appropriations Act, 2013; hereafter, “section 113(a)”). As a result of agreements that were in place in 2011-2014, the WCPO bigeye tuna fishery was not closed in any of those four years because the annual limit for U.S. longline fisheries adopted by the WCPFC was not reached. In 2015 the fishery was closed in August but then reopened when agreements with the CNMI, and later with Guam, went into effect. Participation in an Amendment 7 agreement would likely not come without costs to fishing businesses. As an indication of the possible cost, the terms of the agreement between American Samoa and the members of the Hawaii Longline Association (HLA) in effect in 2011 and 2012 included payments totaling \$250,000 from the HLA to the Western Pacific Sustainable Fisheries Fund, equal to \$2,000 per vessel. It is not known how the total cost was allocated among the members of the HLA, so it is possible that the owners of particular vessels paid substantially more than or less than \$2,000.

The second alternative opportunity (2) (deep-set fishing for bigeye tuna in the EPO), would be an option for affected entities only if it is allowed under regulations implementing the decisions of the Inter-American Tropical Tuna Commission (IATTC).

Annual longline bigeye tuna catch limits have been in place for the EPO in most years since 2004. Since 2009, a bigeye tuna catch limit of 500 mt for 2016 has applied to U.S. longline vessels greater than 24 meters (m) in length (50 CFR 300.25), and the limits were reached in 2013 (November 11), 2014 (October 31), and 2015 (August 12). The highly seasonal nature of bigeye tuna catches in the EPO and the relatively high inter-annual variation in catches prevents NMFS from making a useful prediction of whether and when the limit in 2016 is likely to be reached. However, the trend in 2013-2015 suggests a relatively high likelihood of it being reached in 2016. If it is reached, this alternative opportunity would not be available for large longline vessels, which constitute about a quarter of the fleet. Currently there is no limit in place for 2017; the IATTC would have to take further action to adopt a limit for 2017, and NMFS would then need to implement it to put it into effect.

Historical fishing patterns can provide an indication of the likelihood of affected entities making use of the opportunity of deep-setting in the EPO in the event of a closure in the WCPO. The proportion of the U.S. fishery's annual bigeye tuna catches that were captured in the EPO from 2005 through 2008 ranged from 2 percent to 22 percent, and averaged 11 percent. In 2005-2007, that proportion ranged from 2 percent to 11 percent, and may have been constrained by the IATTC-adopted bigeye tuna catch limits established by NMFS (no limit was in place for 2008). Prior to 2009, most of the U.S. annual bigeye tuna catch by longline vessels in the EPO typically was made in the second and third quarters of the year; in 2005-2008 the percentages caught in the first, second, third, and fourth quarters were 14, 33, 50, and 3 percent, respectively. These data demonstrate two historical patterns—that relatively little of the bigeye tuna catch in the

longline fishery was typically taken in the EPO (11 percent in 2005-2008, on average), and that most EPO bigeye tuna catches were made in the second and third quarters, with relatively few catches in the fourth quarter when the catch limit will most likely be reached. These two patterns suggest that there could be substantial costs for at least some affected entities that shift to deep-set fishing in the EPO in the event of a closure in the WCPO. On the other hand, fishing patterns since 2008 suggest that a substantial shift in deep-set fishing effort to the EPO could occur. In 2009, 2010, 2011, 2012, 2013, and 2014, the proportions of the fishery's annual bigeye tuna catches that were captured in the EPO were about 16, 27, 23, 19, 36, and 36 percent, respectively, and most bigeye tuna catches in the EPO were made in the latter half of the calendar years.

The NMFS study of the 2010 closure (Richmond et al. 2015) found that some businesses—particularly those with smaller vessels—were less inclined than others to fish in the EPO during the closure because of the relatively long distances that would need to be travelled in the relatively rough winter ocean conditions. The study identified a number of factors that likely made fishing in the EPO less lucrative than fishing in the WCPO during that part of the year, including fuel costs and the need to limit trip length in order to maintain fish quality and because of limited fuel storage capacity.

In addition to affecting the volume of landings of bigeye tuna and other species, the catch limits could affect fish prices, particularly during a fishery closure. Both increases and decreases appear possible. After a limit is reached and landings from the WCPO are prohibited, ex-vessel prices of bigeye tuna (e.g., that are caught in the EPO or by vessels in the longline fisheries of the three U.S. Participating Territories), as well as of other species landed by the fleet, could increase as a result of the constricted supply.

This would mitigate economic losses for vessels that are able to continue fishing and landing bigeye tuna during the closure. For example, the NMFS study of the 2010 closure (Richmond et al. 2015) found that ex-vessel prices during the closure in December were 50 percent greater than the average during the previous five Decembers. (It is emphasized that because it was an observational study, neither this nor other observations of what occurred during the closure can be affirmatively linked as effects of the fishery closure.)

Conversely, a WCPO bigeye tuna fishery closure could cause a decrease in ex-vessel prices of bigeye tuna and other products landed by affected entities if the interruption in the local supply prompts the Hawaii market to shift to alternative (e.g., imported) sources of bigeye tuna. Such a shift could be temporary—that is, limited to 2016 and/or 2017—or it could lead to a more permanent change in the market (e.g., as a result of wholesale and retail buyers wanting to mitigate the uncertainty in the continuity of supply from the Hawaii longline fisheries). In the latter case, if locally caught bigeye tuna fetches lower prices because of stiffer competition with imported bigeye tuna, then ex-vessel prices of local product could be depressed indefinitely. The NMFS study of the 2010 closure (Richmond et al. 2015) found that a common concern in the Hawaii fishing community prior to the closure in November 2010 was retailers having to rely more heavily on imported tuna, causing imports to gain a greater market share in local markets. The study found this not to have been borne out, at least not in 2010, when the evidence gathered in the study suggested that few buyers adapted to the closure by increasing their reliance on imports, and no reports or indications were found of a dramatic increase in the use of imported bigeye tuna during the closure. The study concluded, however, that the 2010 closure caused buyers to give increased consideration to imports as part of their

business model, and it was predicted that tuna imports could increase during any future closure. To the extent that ex-vessel prices would be reduced by this action, revenues earned by affected entities would be affected accordingly, and these impacts could occur both before and after the limit is reached, and as described above, possibly after 2017.

The potential economic effects identified above would vary among individual business entities, but it is not possible to predict the range of variation. Furthermore, the impacts on a particular entity would depend on both that entity's response to the rule and the behavior of other vessels in the fleet, both before and after the catch limit is reached. For example, the greater the number of vessels that take advantage—before the limit is reached—of the first alternative opportunity (1), fishing as part of one of the Participating Territory's fisheries, the lower the likelihood that the limit would be reached. The fleet's behavior in 2011 and 2012 is illustrative. In both those years, most vessels in the Hawaii fleet were included in a section 113(a) arrangement with the government of American Samoa, and as a consequence, the U.S. longline catch limit was not reached in either year. Thus, none of the vessels in the fleet, including those not included in the section 113(a) arrangements, were prohibited from fishing for bigeye tuna in the Convention Area at any time during those two years. The fleet's experience in 2010 (before opportunities under section 113(a) or Amendment 7 to the Pelagics FEP were available) provides another example of how economic impacts could be distributed among different entities. In 2010 the limit was reached and the WCPO bigeye tuna fishery was closed on November 22. As described above, dual permit vessels were able to continue fishing outside the U.S. EEZ around the Hawaiian Archipelago and benefit from the relatively high ex-vessel prices that bigeye tuna fetched during the closure.

In summary, based on potential reductions in ex-vessel revenues, NMFS has estimated that the upper bound of potential economic impacts of the rule on affected longline fishing entities could be roughly \$162,000 per vessel, on average, in 2016 and \$185,000 per vessel, on average, in 2017. The actual impacts to most entities are likely to be substantially less than those upper bounds, and for some entities the impacts could be neutral or positive (e.g., if one or more Amendment 7 agreements are in place in 2016 and 2017 and the terms of the agreements are such that the U.S. longline fleet is effectively unconstrained by the catch limits).

Disproportionate Impacts

As indicated above, all affected entities are believed to be small entities, so small entities would not be disproportionately affected relative to large entities. Nor would there be disproportionate economic impacts based on home port.

Purse seine vessels would be impacted differently than longline vessels, but whether the impacts would be disproportional between the two gear types cannot be determined.

For the longline sector, as described above, there could be disproportionate impacts according to vessel type and size and the type of fishing permits held. A vessel with both a Hawaii Longline Limited Access Permit and an American Samoa Longline Limited Access Permit would be considered part of the American Samoa longline fishery (except when fishing in the U.S. EEZ around the Hawaiian Archipelago), so it would not be subject to the catch limits. Because the EPO bigeye tuna catch limit for 2016 applies only to vessels greater than 24 m in length, in the event that the WCPO bigeye tuna fishery is closed and the 500 mt limit is reached in the EPO, only vessels 24 m or less in

length would be able to take advantage of the alternative opportunity of deep-setting for bigeye tuna in the EPO. On the other hand, smaller vessels can be expected to find it more difficult, risky, and/or costly to fish in the EPO during the relatively rough winter months than larger vessels. If there are any large entities among the affected entities, and if the vessels of the large entities are larger than those of small entities, then it is possible that small entities could be disproportionately affected relative to large entities.

Steps Taken to Minimize the Significant Economic Impacts on Small Entities

NMFS has sought to identify alternatives that would minimize the rule's economic impact on small entities ("significant alternatives"). Taking no action could result in lesser adverse economic impacts than the action for affected entities in the purse seine and longline fisheries (but as described below, for some affected longline entities, the rule could be more economically beneficial than no-action), but NMFS has determined that the no-action alternative would be inconsistent with the United States' obligations under the Convention, and NMFS has rejected it for that reason. Alternatives identified for each of the three elements of the rule are discussed below.

1. Purse seine observer requirements

NMFS has not identified any significant alternatives to the purse seine observer requirements that would comport with U.S. obligations to implement the Commission decisions regarding observer coverage.

2. Purse seine FAD restrictions for 2016-2017

NMFS considered in detail one set of alternatives to the restrictions on the use of FADs. Under CMM 2015-01, the United States could use either of two options in either of 2016 and 2017 (in addition to the three-month FAD closure periods in both years and

the prohibition on FAD sets on the high seas in 2017). One option is a fourth-month FAD prohibition period, in October. The second option, which is part of this rule, is an annual limit of 2,522 FAD sets. The relative effects of the two options would depend on the total amount of fishing effort exerted by the U.S. purse seine fleet in the Convention Area in a given year. If total fishing effort is relatively high, an October FAD prohibition period would likely allow for more FAD sets than a limit of 2,522 FAD sets, and thus likely cause lesser adverse impacts. The opposite would be the case for relatively low levels of total fishing effort. For example, given the fleet's recent historical average FAD set ratio of 58 percent when FAD-setting is allowed (2010-2013), and assuming an even distribution of sets throughout the year, the estimated "breakeven" point between the two options is 6,502 total sets for the year. The levels of fishing effort in 2016 and 2017 are very difficult to predict; they will be determined largely by the level of participation in the fishery (number of vessels) and any limits imposed on fishing effort. Fishing effort in foreign zones and on the high seas in the SPTT Area is likely to be limited by the terms of arrangements under the SPTT. Fishing effort elsewhere in the Convention Area (e.g., in the U.S. EEZ and on the high seas outside the Treaty Area) will be constrained by any limits established by NMFS to implement the provisions of CMM 2015-01. NMFS has not yet established or proposed any such limits for 2016 or 2017, and cannot speculate what limits it might propose, but a point of reference are the limits that were in place in 2009-2015. Those limits applied to the Effort Limit Area for Purse Seine, or ELAPS, which consists of all areas of high seas and U.S. exclusive economic zone in the Convention Area between the latitudes of 20° N. and 20° S. The limits in 2009-2013 were 2,588 fishing days per year. The limits in 2014-2015 were 1,828 fishing days per

year. With respect to numbers of vessels and allowable fishing effort limits under the SPTT, 2016 is an unusual year in that SPTT licenses for 2016 were not issued until March, and the number of licensed vessels (34 as of May 2016) is fewer than in recent years. Thus, there has been relatively little purse seine fishing effort to date in the Convention Area in 2016, and NMFS expects that total fishing effort in 2016 is likely to be less than 6,502 sets (the estimated breakeven point between the two options). For reference, the average number of sets made annually in 2010-2013, when an average of 38 vessels were active in the fishery, was 7,835. The average number of fishing days made annually in 2010-2013 was 8,030, so the average number of sets made per fishing day was 0.97. Predicting the situation for 2017 is even more difficult than for 2016, but current circumstances suggest that participation in 2017 could be less than in recent years. Also, because setting on FADs on the high seas will be prohibited in 2017 under this rule, the estimated breakeven point of 6,502 total sets applies not everywhere in the Convention Area, but only those portions that are not high seas. Assuming that about 10 percent of fishing effort takes place on the high seas, as in 2010-2013, the breakeven point for the Convention Area as a whole is about 7,224 total sets. Assuming 0.97 sets per fishing day, on average, as occurred in 2010-2013, this equates roughly to 7,371 fishing days. This is slightly less than the average annual fishing effort in 2010-2013 (7,835 sets; 8,030 fishing days), but again, given current circumstances and uncertainty surrounding the future of the SPTT, NMFS expects that total fishing effort in 2017 is likely to be less than that breakeven level. Based on the above expectations and assumptions for conditions in 2016 and 2017, a FAD prohibition period in October is likely to have greater adverse impacts on fishing businesses than an annual limit of 2,522

FAD sets, in both 2016 and 2017. After considering the objectives of CMM 2015-01, the expected economic impacts of both alternatives on U.S. fishing operations and the nation as a whole, and expected environmental and other effects, NMFS expects that for both 2016 and 2017, a limit of 2,522 FAD sets is likely to be somewhat more cost-effective than a FAD prohibition period in October. For this reason, NMFS has rejected the latter alternative.

3. Longline bigeye tuna catch limits

NMFS has not identified any significant alternatives to this element of the rule, other than the no-action alternative.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as “small entity compliance guides.” The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. NMFS has prepared small entity compliance guides for this rule, and will send the appropriate guide(s) to holders of permits in the relevant fisheries. The guides and this final rule also will be available at www.fpir.noaa.gov and by request from NMFS PIRO (see **ADDRESSES**).

List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Fish, Fisheries, Fishing, Marine resources,
Reporting and recordkeeping requirements, Treaties.

Dated: June 17, 2016.

Samuel D. Rauch III,
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 300 is amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart O—Western and Central Pacific Fisheries for Highly Migratory Species

1. The authority citation for 50 CFR part 300, subpart O, continues to read as follows:

Authority: 16 U.S.C. 6901 *et seq.*

2. In § 300.222, add paragraph (ww) to read as follows:

§ 300.222 Prohibitions.

* * * * *

(ww) Fail to carry an observer as required in § 300.223(e).

3. In § 300.223:

a. Revise paragraph (b)(1) introductory text and paragraphs (b)(2)(i) and (ii); and

b. Add paragraphs (b)(2)(iii) and (iv), and paragraph (e) to read as follows:

§ 300.223 Purse seine fishing restrictions.

* * * * *

(b) * * *

(1) During the periods and in the areas specified in paragraph (b)(2) of this section, owners, operators, and crew of fishing vessels of the United States shall not do any of the activities described below in the Convention Area in the area between 20° N. latitude and 20° S. latitude:

* * * * *

(2) * * *

(i) From July 1 through September 30, 2016;

(ii) From July 1 through September 30, 2017;

(iii) During any period specified in a **Federal Register** notice issued by NMFS announcing that NMFS has determined that U.S. purse seine vessels have collectively made, or are projected to make, 2,522 sets on FADs in the Convention Area in the area between 20° N. latitude and 20° S. latitude in 2016 or 2017. The **Federal Register** notice will be published at least seven days in advance of the start of the period announced in the notice. NMFS will estimate and project the number of FAD sets using vessel logbooks, and/or other information sources that it deems most appropriate and reliable for the purposes of this section; and

(iv) In any area of high seas, from January 1 through December 31, 2017.

* * * * *

(e) *Observer coverage.* (1) A fishing vessel of the United States may not be used to fish with purse seine gear in the Convention Area without a WCPFC observer on board. This requirement does not apply to fishing trips that meet either of the following conditions:

(i) The portion of the fishing trip within the Convention Area takes place entirely within areas under the jurisdiction of a single nation other than the United States; or,

(ii) No fishing takes place during the fishing trip in the Convention Area in the area between 20° N. latitude and 20° S. latitude.

(2) Owners, operators, and crew of fishing vessels subject to paragraph (e)(1) of this section must accommodate WCPFC observers in accordance with the provisions of § 300.215(c).

(3) Meeting either of the conditions in paragraphs (e)(1)(i) and (ii) of this section does not exempt a fishing vessel from having to carry and accommodate a WCPFC observer pursuant to § 300.215 or other applicable regulations.

4. In § 300.224, revise paragraph (a) to read as follows:

§ 300.224 Longline fishing restrictions.

(a) *Establishment of bigeye tuna catch limits.* (1) During calendar year 2016 there is a limit of 3,554 metric tons of bigeye tuna that may be captured in the Convention Area by longline gear and retained on board by fishing vessels of the United States.

(2) During calendar year 2017 there is a limit of 3,345 metric tons of bigeye tuna that may be captured in the Convention Area by longline gear and retained on board by

fishing vessels of the United States.

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